

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

JOSEPH F. DUFT,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

DOCKET NUMBER  
SE083184A0107

DATE: MAY 6 1987

Joseph F. Duft, Boise, Idaho, pro se.

Jerome Julius, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Dennis M. Devaney, Member

Chairman Levinson dissents.

OPINION AND ORDER

The appellant petitions for review of an addendum decision issued October 16, 1984, which denied his motion for attorney fees on the basis of *Williams v. Office of Personnel Management*, 718 F.2d 1553 (Fed. Cir. 1983). See 51 Fed. Reg. 25,152 (1986) (to be codified at 5 C.F.R. § 1201.37)<sup>1</sup> For the reasons discussed below, we GRANT the

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<sup>1</sup> On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations

appellant's petition, VACATE the addendum decision, and REMAND the case to the Seattle Regional Office for further proceedings in accordance with this Opinion and Order.

#### BACKGROUND

The appellant had appealed from the decision of the Office of Personnel Management (OPM) which denied his application for retirement under the special provision for firefighters in 5 U.S.C. § 8336(c). In an initial decision dated May 8, 1984, the administrative judge<sup>2</sup> dismissed the appeal as moot, noting that the OPM had reversed its earlier decision and granted the relief sought. The appellant then filed a motion for attorney fees. In an addendum decision dated October 16, 1984, the administrative judge denied the motion, finding, on the basis of the court's decision in *Williams*, that the Board had no authority to grant attorney fees in a retirement case.

The appellant claims that it would have been costly and futile for him to have appealed the addendum decision in 1984 because it was based upon a policy interpretation which was changed after the Supreme Court overruled the policy in 1985. He states that he first became aware of the change in policy when the Seattle Regional Office issued a decision

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[footnote continued]

at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

<sup>2</sup> Effective May 8, 1986, the working title for the Board's presiding officials was changed to "administrative judge."

on March 25, 1986, awarding attorney fees in a firefighter retirement case similar to his. On May 7, 1986, he mailed a letter to the Seattle Regional Office requesting reconsideration of the October 16, 1984, decision. The letter was forwarded to the Office of the Clerk of the Board in Washington, D.C. On May 28, 1986, he filed a petition for review asking the Board to grant his request for attorney fees.

#### ANALYSIS

The line of cases holding that the Board lacked authority to award attorney fees in retirement cases was overruled as a result of the Supreme Court's decision in *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 105 S.Ct. 1620 (1985). The Court of Appeals for the Federal Circuit, relying upon its own decision in *Lindahl*, 718 F.2d 391 (Fed. Cir. 1983), then overruled its *Williams* decision in *Simmons v. Office of Personnel Management*, 768 F.2d 323 (1985). Although these cases involved attorney fees in employee-initiated disability retirement appeals, in *Leppelman v. Office of Personnel Management*, 29 M.S.P.R. 263, 264 (1985), based upon *Simmons*, the Board held that it also has authority to award attorney fees in a legal retirement appeal.

Recently, in *Stephens v. Office of Personnel Management*, MSPB Docket No. SF831L84A9006 (March 23, 1987),

the Board decided<sup>3</sup> that *Simmons* should be given retroactive effect to appellants who have established that attorney fees are warranted in the interest of justice, in order that they "will receive the full remedy contemplated by the Congress in enacting the [Civil Service Reform Act]." See *Stephens*, slip op. at 11.

In his addendum decision, the administrative judge cited *Williams* in finding that the Board had no authority to award attorney fees in retirement appeal cases. The appellant reasonably understood that it would be fruitless and costly for him to appeal that ruling at that time. Moreover, the record shows that he sought to obtain review of the 1984 addendum decision in his case within a short time after he first became aware that the Board's policy had changed. Therefore, we find that the appellant has demonstrated that he acted with due diligence and that good cause exists for accepting the petition for review in this case as timely filed. See *Stephens*, slip op. at 13.

As in *Stephens*, slip op. at 12, since the agency has not had an opportunity to address the merits of the appellant's motion for attorney fees, we find it appropriate to remand this case to the Seattle Regional Office to provide the OPM with an opportunity to comment on the merits of the appellant's motion.

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<sup>3</sup> Chairman Levinson wrote a separate opinion dissenting in part and concurring in part.

ORDER

The addendum decision dated October 16, 1984, is hereby VACATED, and the case is REMANDED to the Seattle Regional Office to provide the OPM with an opportunity to comment on the merits of the appellant's motion for attorney fees and to issue a new addendum decision. See Stephens, slip op. at 14.

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board

SEPARATE OPINION OF CHAIRMAN DANIEL R. LEVINSON  
DISSENTING

I respectfully dissent for the reasons stated in my  
partial dissent in *Stephens v. OPM*, MSFB Docket No.  
SF831L84A9006 (March 23, 1987).

  
Daniel R. Levinson, Chairman

May 5, 1987